71-741

No.

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

ROBERT E. MESSENGER, *Petitioner,*

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 4, AND INTERNATIONAL UNION OF OPERATING ENGINEERS AND CHARLES DE ROSA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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December 6, 1971

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IN THE

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OCTOBER TERM, 1971

No.

ROBERT E. MESSENGER, *Petitioner,*

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 4, AND INTERNATIONAL UNION OF OPERATING ENGINEERS AND CHARLES DE ROSA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner Robert E. Messenger respectfully prays that a writ of certiorari issue to review the memorandum and order of the United States Court of Appeals for the First Circuit entered in this proceeding on July 28, 1971.

OPINIONS BELOW

The memorandum and order of July 28, 1971, of the United States Court of Appeals for the First Circuit is not yet reported; it is reprinted as Appendix A to this petition (App. A.). The judgment of March 4, 1971, of the District Court for the District of Mas-

sachusetts has not been officially reported; it is reprinted as Appendix B to this petition (App. B.).

JURISDICTION

The memorandum and order of the United States Court of Appeals for the First Circuit was entered on July 28, 1971 (App. A.). A petition for rehearing was denied on August 19, 1971. On October 18, 1971, Mr. Justice Brennan extended the time for filing this petition to and including November 26, 1971. On November 10, 1971, Mr. Justice Brennan granted a further extension of time for filing this petition to and including December 6, 1971. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming a judgment of the District Court granting summary judgment for respondents herein, where substantial and material questions of fact existed as to whether petitioner was properly expelled from union membership?

2. Whether the Court of Appeals and the District Court improperly applied the standard enunciated by this Court in *Boilermakers* v. *Hardeman,* 401 U.S. 233 (1971), in a manner which deprived petitioner of fundamental rights to due process and the protection provided by federal statute?

3. Whether the statutory requirements of Section 101(a)(5) of the Labor-Management Reporting and Disclosure Act (73 Stat. 523, 29 U.S.C. § 411(a)(5)), have been adhered to where petitioner was not served with written specific charges enabling him to prepare his defense and where the petitioner did not receive a full and fair hearing?

STATUTORY PROVISIONS

Section 101(a)(5) of the Labor Management Reporting and Disclosure Act, 73 Stat. 523, 29 U.S.C. § 411 (a)(5) (1970) provides:

> "Safeguards against improper disciplinary action.—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (b) given a reasonable time to prepare his defense; (c) afforded a full and fair hearing."

Section 102 of the Labor-Management Reporting and Disclosure Act, 73 Stat. 523, 29 U.S.C. § 412 (1970) provides:

> "Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located."

STATEMENT

The petitioner, Robert E. Messenger ("Messenger", "petitioner" or "plaintiff"), is or was a member of the International Union of Operating Engineers, Local 4 and the International Union of Operating Engineers.

The respondent, International Union of Operating Engineers, Local 4 ("Local 4"), is a branch of the International Union of Operating Engineers. Local 4 is a subordinate local of said International Union,

and is managed by a President, Vice President, Financial Secretary, Recording Secretary, Trustees, Auditors, a Business Manager, Business Agents and an Executive Board.

The respondent, International Union of Operating Engineers ("International Union"), is an international unincorporated association whose membership is made up principally of individuals in the building trade. It is composed of an International Union and a number of locals.

The respondent, Charles DeRosa ("DeRosa"), is and was the Vice President and Business Representative of Local 4 and a member of the Executive Board of said Local. He acts for Local 4 in prescribing work assignments, grievance adjustments, suspensions, reinstatements and expulsion of members of Local 4.

The petitioner became a member in good standing of Local 4 and the International Union on or about August 18, 1941, and from that date to the present date has paid or tendered payment of dues pertaining to members of Local 4, and has always been a member in good standing in Local 4 and the International Union, except for the present controversy.

In February, 1967, petitioner, without the assistance of respondent Local, procured a job with Jefferson Construction Co. on portable power plants. In an effort to insure that he would remain employed after the completion of the Jefferson Construction job, petitioner, on his own initiative, secured a job demonstrating a new type of forklift at Bentley College. He requested that the Local find a replacement for him on the Jefferson job so that he could work on the

Bentley job. One Albert N. Verrochi, an unemployed Local 4 member, was sent as a replacement on the Jefferson job by the union. (Certified Record, p. 34a, Count IX.)

Various Local 4 officers and members, personally hostile to petitioner, were angered by the prospect of petitioner's long-term employment at the Bentley job. (Record, p. 35a, Count IX.) Thereafter, a complaint was filed against petitioner. (Record, p. 4a, para. 3.)

In order to understand the setting in which said complaint was filed and considered at the Messenger "trial", it is necessary to trace briefly the relationship between petitioner and the Local 4 leadership. For more than fifteen years petitioner has incurred the wrath and displeasure of Local 4 officials through his continued efforts to fight for his rights and those of his fellow union members. During the period 1961 through 1965, petitioner held office in Local 4 as a trustee and auditor, and while holding such office refused to sign audits of the Local's financial records because proper substantiation was not provided. During the period 1960 through 1969, petitioner was a candidate for President of the Local and campaigned against the present office holders on the basis that proper union records were not being kept. Petitioner's conduct was resented by Local 4 officials who did all that was within their power to prevent petitioner from securing work. (Record, p. 34a, Counts VII and VIII.) On November 19, 1969, the National Labor Relations Board (Case No. 1-CB-1471 and 1486), found Local 4 guilty of an unfair labor practice in discriminating against petitioner in job referrals. (Record, p. 28a, para. 12.)

It is in this context that the complaint was filed against petitioner by brother union member Verrochi. The Verrochi letter stated, in part: "I prefer charges against Brother Robert E. Messenger under Article XXIII, Subdivision 7, Section E." (App. C.) The reference was apparently to the Constitution governing the International Union of Operating Engineers and All Subdivisions, Bodies, Local Unions and Members thereof, Article XXIII of which is printed as Appendix D.

This section of the Constitution lists some thirteen separate and distinct charges which may be brought against a Union officer or member. The letter complaint failed to specify which of the thirteen listed causes petitioner had allegedly violated. The only additional information contained in the complaint was an unsupported hearsay accusation that petitioner had falsely claimed sick leave.

On June 21, 1967, a union "trial" was convened at which time Verrochi testified and petitioner allegedly was given an opportunity to testify. (Record, p. 5a, para. 4.) Inasmuch as the charges leveled against him remained vague and uncertain, petitioner once again attempted to ascertain the specific constitutional offense with which he was being charged. He received no reply other than a repeated reference to the "catch-all" section of the Union constitution containing thirteen separate and distinct offenses. The petitioner was thereafter found "guilty" of the charges, although no reference was made to any specific constitutional offense. (Record, p. 28a, para. 4.)

Thereafter, and throughout the period of petitioner's unsuccessful union appeal, petitioner attempted to pay "Under Protest" his current dues and the $500

fine imposed. Such attempts were repeatedly rejected by the Local with a statement that it was Union policy to refuse checks with restrictive endorsements. (Record, p. 36a-37a, Counts XIII, XIV, XV, XVI.) At no time has the Union cited any constitutional or regulatory authority for such refusals nor the manner in which the Local's rights to payment were infringed or impeded by such an endorsement.

On August 8, 1969, petitioner tendered to Local 4 the entire fine *without* a restrictive endorsement only to find that prior to acceptance of payment, he would be required to sign a reinstatement application which provided, in part, that certain seniority benefits would be lost and that the beneficiaries of his death benefits would not be entitled to claim until he had been a member in good standing for one year after his reinstatement. (Record, p. 37a, Count XV.)

On September 25, 1969, petitioner made one last effort to tender his dues but was informed that he had been expelled from membership. (Record, p. 37a, Count XVI.)

REASONS FOR GRANTING THE WRIT

Several grounds exist under Rule 19 of the Supreme Court's Rules which may move this Court to exercise jurisdiction. Possibly the strongest reason lies in the fact that the judgments of the courts below conflict with the recent holding of this Court in *International Brotherhood of Boilermakers* v. *Hardeman*, 401 U.S. 233 (1971). The *Boilermakers* case is the only precedent cited in support of the Orders of both the District Court and Court of Appeals. It is respectfully submitted that the courts below erroneously applied the holding of *Boilermakers* to circumstances

significantly different from those which existed in that case; and as misconstrued the Court granted summary judgment to the defendant resulting in a gross miscarriage of justice whereby the plaintiff was denied his day in court.

In addition, the matters considered in this case involve important issues of public consequence and federal statutory construction. If the decisions below are permitted to stand as correct interpretations of this Court's decision in *Boilermakers,* the fundamental rights of due process to which this petitioner and potentially thousands of similarly situated union members are entitled, will be abrogated.

If the opinions of the courts below are permitted to stand, the requirements for service of written specific charges, a reasonable opportunity to defend, and a full and fair hearing contained in Section 101(a)(5) of the Labor-Management Reporting and Disclosure Act (29 U.S.C. § 411(a)(5) (1970)) (hereafter LMRDA), will be so watered down as to be meaningless. Such statutory construction would be inconsistent with both legislative and judicial intent, and would be effectuated without benefit of full judicial review.

I. THE COURT OF APPEALS COMMITTED ERROR IN AFFIRMING THE DISTRICT COURT'S ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WHERE THERE EXISTED GENUINE ISSUES OF MATERIAL FACTS AND WHERE DEFENDANT WAS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW.

The instant case represents a classic example of a proceeding which was *not* ripe for summary judgment. The only substantial and material fact that is *not* controverted is the fact that petitioner has been expelled from Union membership and has thereby been

rendered professionally and economically impoverished.

The law is quite clear that motions for summary judgment should be granted only if it is shown that there is no genuine issue as to any material fact. Due to the drastic nature of the remedy, "[t]his requirement is to be strictly construed so as to insure that factual issues will not be determined without the benefit of the truth-seeking procedures of a trial." *Jackson Tool & Die, Inc.* v. *Smith,* 339 F.2d 88, 91 (5th Cir. 1964).

As this Court has so often stated, the record on such a motion must be viewed in the light most favorable to the party opposing the motion. *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464 (1962). However, it is incumbent upon the party opposing the summary judgment motion to set forth specific facts which show there is a genuine issue for trial (Fed. R. Civ. P. 56(e)).

In this case there are four pivotal matters of substance upon which any judgment must be based: (1) Was petitioner provided with notice of the specific charges brought against him? (2) Was he, thereby, afforded a reasonable opportunity to defend himself? (3) Was petitioner accorded a full and fair hearing? and (4) Was his tender of payment of all fines and dues improperly refused by the Union in a continuing effort to harass petitioner and prejudice his case?

Even the most cursory review of petitioner's Bill of Complaint and his Affidavit in Opposition to Defendant's Motion For Summary Judgment reveals that specific, genuine issues of material fact exist as to *each* of these pivotal matters.

Thus, the petitioner has shown (and respondents have failed adequately to rebut), that he was charged under Article XXIII, Subdivision 7, Section E of the Union Constitution which includes offenses ranging from embezzlement, insubordination, drunkenness, and slander to divulging the secret Union password. Petitioner's continued efforts to elicit some specificity were met by repeated Union refusals. How could petitioner be expected to defend himself? Was he required to select one or more of the thirteen listed offenses and prepare a defense at his own risk?

Furthermore, petitioner's pleadings before the District Court raised substantial questions as to the nature of the proceedings at his Union "trial" and whether there was any evidence offered to support a "guilty" verdict. Petitioner stood ready to demonstrate to the District Court, and remains ready to be put to his proof, that the Union proceedings amounted to little more than a sham riddled with prejudice, that they constituted a mockery of petitioner's attempts to elicit specificity in the charges leveled, and that they reveal a complete failure to afford him a "full and fair hearing" as required by this statute. It should be noted, parenthetically, that there was as much specificity in the verdict, "guilty of charges", as there was in the original charges. (Record, p. 19a, Exh. J.)

Finally, the record is replete with references to petitioner's attempts to pay his dues and fine and the Local's repeated wrongful refusal of such tenders. Petitioner was and is prepared to show that such tenders were arbitrarily refused in an effort to further harass petitioner, prejudice his case, and bring about his illegal expulsion from the Union. It is

clear that payment made under protest does not make the tender involuntary. *Little* v. *Bowers,* 134 U.S. 547 (1889). The object of payment under protest is to conserve to the party making such an endorsement a right of action to recover the money. It does not create a lien upon the money or represent any legal impediment to its control. It does not alter the operative effect of the payment as a discharge of the demand, so far as such demand is proper. *Jaynes* v. *Heron,* 46 N.M. 431, 130 P.2d 29 (1942), citing favorably *McMillan* v. *Richards,* 9 Cal. 365, 70 Am. Dec. 655 (1858).

These were the facts that were pleaded to the District Court. Viewed in the light most favorable to petitioner, or viewed in any light, can it be said that respondents were entitled to judgment as a matter of law? Petitioner continues to pray for only one "day in court."

II. THE COURTS BELOW MISCONSTRUED ONE PART AND FAILED TO CONSIDER ANOTHER PART OF THIS COURT'S OPINION IN BOILERMAKERS v. HARDEMAN AND IMPROPERLY APPLIED SAID DECISION TO THE FACTS OF THIS CASE.

Both of the lower courts based their decisions almost totally on this Court's recent decision in *Boilermakers* v. *Hardeman, supra.* In so doing, each court seriously misconstrued that opinion in a manner which, if allowed to stand, would have the shocking effect of abrogating the very purposes for which the LMRDA was passed.

A. The Lower Courts' Decisions Fail Properly to Apply the Holding in Boilermakers and Thereby Nullify the Requirements for Specificity of Charges and Removal of Prejudice.

In its *Boilermakers'* [1] decision, the Court said that it was not the function of the federal courts in reviewing union disciplinary action to review the scope of the alleged offense to see whether it was punishable. The Court did not in any way intend to abrogate the due process rights of an accused to have specific written charges, time to prepare a viable defense, a full and fair hearing and to be convicted only on the basis of some material evidence.

Indeed the Court quoted Senator McClellan's statement that the charges must be:

> "specific enough to inform the accused member of the offense that he has allegedly committed."[2]

The Court unequivocably stated in regard to the charges against Hardeman that

> "Where, as here, the union's charges make reference to specific written provisions, § 101(a)(5) (a) *obviously empowers the federal courts* to examine those provisions and determine *whether the union member has been misled or otherwise prejudiced in the presentation of his defense.*"

(401 U.S. at 245; emphasis supplied.) This *was not done* in the present case. Rather, the court refused

[1] The Court of Appeals decision erroneously noted that petitioner made no reference to *Boilermakers* despite the fact that the District Court called it to his attention. In fact, three full pages in petitioner's appellate brief were devoted to distinguishing that case.

[2] Labor-Management Reform Legislation, Hearings Before a Joint Subcommittee of the House Committee on Education and Labor, 86th Cong., 1st Sess., pt. 5, p. 2285 (1959).

to allow petitioner his day in court *on the basis of Boilermakers,* in spite of the fact that the record is so replete with prejudice throughout the proceedings that without a complete record and transcript of the hearing it was impossible on the pleadings for a court to hold that no prejudice existed.

In keeping with the Court's *Boilermakers* decision, petitioner submits that, although it is not a requirement that an alleged offense be in contravention of a previously published union regulation, once violation of a written regulation is charged, it is necessary to identify specifically the regulation violated. In this case petitioner was charged with a violation of "Article XXIII, Subdivision 7, Section E" of the Union Constitution. While this may appear specific at first blush, it is not when it is considered that there are thirteen separate and distinct offenses listed in that section.

Although petitioner attempted on many occasions to get a more specific designation of charges from the union, none was forthcoming. Surely this is the kind of thing which would "mislead or otherwise prejudice [the union member] in the presentation of his defense" and thereby guarantee a full federal court review under § 101(a)(5)(A). To deny this construction is to say that to charge is to convict.

B. The Courts Below Failed To Apply Part III of the Opinion in Boilermakers v. Hardeman and Therefore Did Not Determine Whether the Union Charges Were Supported With Sufficient Evidence To Sustain a Finding of Guilt.

While the preceding paragraphs have demonstrated the obvious manner in which the courts below misconstrued the standards of *Boilermakers,* it is equally apparent that these courts have *completely overlooked*

the holding of that case with respect to the question of the sufficiency of evidence.

In *Boilermakers,* this Court noted that the LMRDA guarantees a union member a "full and fair" hearing and that the proper standard of judicial review is an examination of whether there was "some evidence at the disciplinary hearing to support the charges made." (401 U.S. at 246.) Thus, the Court stated that a conviction on charges unsupported by any evidence is a denial of due process. *Boilermakers* recognized that it was the intent of Congress to require the "'usual reasonable constitutional basis'" (*id.*) for disciplinary action under the LMRDA and that any lesser standard would make useless the requirements of Section 101(a)(5)(A).

How have the courts below adhered to this standard in light of petitioner's repeated claim that he did not receive a full and fair hearing? The terse orders contain no discussion—not even a passing reference—to this most critical matter. This is not surprising because the record contains absolutely no illuminative evidence relating to any aspect of petitioner's "trial".

The only mention in the record of the union proceedings is a brief comment that a trial was held, that the charging party testified, that petitioner was unable to respond to the vague and uncertain charges, and that a vote was taken. (Record, p. 5a, para. 4; p. 28a, para. 4.) Does this constitute a showing that there was "some evidence to support the charges made"? The record is barren of any reference to the nature of the testimony heard at the Union hearing; no transcript of the proceedings was offered in

evidence. Petitioner does not seek to have this Court sift or weigh the evidence which supported a finding of guilt; rather he respectfully submits that there is *no* such evidence.

By their failure to consider this aspect of the case, the courts below have committed substantial error and have deprived petitioner of fundamental rights to due process guaranteed under the law. In a case cited in *Boilermakers* the court stated that a court reviewing Union action under § 101(a)(5)

> "'. . . must be cognizant that all the trappings of judicial due process come to naught if the Union tribunal may, in Dreyfus fashion, expel a member on charges supported by no evidence.'"

Lewis v. *American Federation of State, County and Municipal Employees,* 407 F.2d 1185, 1192 (3d Cir. 1969).

The Courts are charged with a close reading of the record to insure that the findings are not without any foundation in the evidence. *Vars* v. *International Brotherhood of Boilermakers,* 320 F.2d 576 (5th Cir. 1963).

Furthermore, in reviewing a record replete with evidence of prejudice and harassment, it is mandatory that judicial bodies closely scrutinize the conduct of the disciplinary proceeding. Thus, although the Union record may appear to be in order, if petitioner can show that the Union trial body was biased or that, for some reason, he did not receive a fair and impartial determination of guilt, he may obtain judicial relief. *Addison* v. *Grand Lodge of International Association of Machinists,* 318 F.2d 504 (9th Cir. 1963);

Burke v. *International Brotherhood of Boilermakers*, 302 F. Supp. 1345 (D.C.Cal. 1967), *aff'd* 417 F.2d 1063 (9th Cir. 1969).

III. THE LOWER COURTS' DECISIONS EFFECTIVELY ABROGATE THE REQUIREMENTS OF THE LMRDA.

The opening paragraphs of the LMRDA (29 U.S.C. § 401 (1970)), clearly delineate the purpose for the enactment of this legislation:

> "The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees. . . ."

Included in this protection are the safeguards against improper disciplinary action contained in Section 101(a)(5) of the Act which require, as a prerequisite to expulsion, written specific charges, a reasonable time to prepare a defense and a full and fair hearing.

As has been pointed out in the preceding sections, these safeguards were not afforded petitioner in this case and, if the present misapplication of the statute and *Boilermakers* is allowed to stand, irreparable harm will come to petitioner and potentially thousands of similarly situated union members.

CONCLUSION

As a result of the improvident grant of summary judgment, a gross misconstrual of Part II of *Boilermakers,* a complete failure to consider Part III of said opinion, and faulty statutory construction, the lower courts have failed to afford petitioner the relief guaranteed by § 101(a)(5)(A) of the LMRDA. It is respectfully requested that this Court grant petitioner's request that a writ of certiorari issue to correct these grievous wrongs and to protect other similarly situated union members against similar action.

Respectfully submitted,

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December 6, 1971

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 71-1117

ROBERT E. MESSENGER, *Plaintiff, Appellant,*

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 4 ET AL., *Defendants, Appellees.*

Before ALDRICH, Chief Judge; McENTEE and COFFIN, Circuit Judges

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Memorandum and Order

Entered July 28, 1971

Plaintiff sued the defendants, a local and a parent union, and an officer, pursuant to 29 U.S.C. § 412 for various matters, all barred by the statute of limitations except for his expulsion from the union for non-payment of a fine. Plaintiff had attempted at one point to pay the fine with a check marked "Payment under Protest," but the defendants refused to accept the check, as they had a right to. Furthermore, and as a separate matter, this tender was long after the six months grace that, as plaintiff had been told, the union constitution afforded for unconditional receipt of fines, viz., without an application for reinstatement into the union. If there was any merit in plaintiff's suit, accordingly, it was because the fine was illegally imposed. This, in turn, depended upon whether plaintiff was, as he

claims, not properly charged. On a motion for summary judgment, accompanied by affidavits, the district court ruled against him, and this appeal followed.

The charge was made by a fellow member, by letter. It referred, by number, to a certain catchall provision in the constitution. Plaintiff complains that this provision listed 13 types of general offenses, and that the charge did not, in terms, state which one was relied on. This is true. However, the letter asserted the basic facts upon which the accusation depended. It is an erroneous legalism for plaintiff to say that he received no notice of the "charge brought against me". It was not necessary to specify into which particular clause in the section the conduct fitted. All that plaintiff was entitled to was adequate notice as to what, factually, he must defend against." *Boilermakers* v. *Hardeman*, 1971, 401 U.S. 233. This he received. Beyond this we have "no warrant to scrutinize the union regulations in order to determine whether particular conduct may be punished at all." Id. at 245.

This appeal, in the light of the Court's clear and relevant pronouncements in *Boilermakers*, to which the district court called plaintiff's attention, and to which plaintiff still makes no reference, is totally without merit. The judgment is affirmed under Local Rule 6.

By the Court:

/s/ DANA H. GALLUP
Clerk.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil No. 69-1193-F

ROBERT E. MESSENGER, *Petitioner-Appellant*

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 4 AND INTERNATIONAL UNION OF OPERATING ENGINEERS AND CHARLES DEROSA, *Respondent-Appellees*

FORD D.J.,

After hearing on defendant's motion for Summary Judgment, and after due consideration by this Court (See: International Brotherhood of Boilermakers v. Hardeman, 39 L.W. 4275) it is

ORDERED that judgment be, and hereby is, entered for the defendant dismissing the complaint.

By the Court

/s/ AUSTIN W. JONES, JR.
Deputy Clerk

/s/ FRANCIS J. W. FORD
United States District Judge

March 4, 1971

APPENDIX C

Letter of Verrochi

May 17, 1967

I prefer charges against Brother Robert Messenger under article XXIII Subdivision 7, Section E.

I was sent out to take Brother Messenger's place by business agent Carl Bucci.

Carl said Messenger said he was sick and would be out for a couple of days.

I worked May 9, 10 and 11th for Jefferson Constr. Co. at East Boston housing project. He came back to work Friday May 12th.

Since I went to take his place I have found out that he was not sick and he was working for a non union company on a job in Waltham.

ALBERT N. VERROCHI
11 Century Lane
Milton, Mass. 02186

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APPENDIX D

The

CONSTITUTION

Governing

THE INTERNATIONAL UNION OF OPERATING ENGINEERS

and

All Subdivisions, Bodies, Local Unions and Members Thereof

* * * * * * * * * * *

Other Causes for Fines, Suspensions or Expulsion

Art. XXIII, Subdiv. 7, Section (e). Any officer or member of a Local Union who becomes an habitual drunkard; who wrongs a fellow member or defrauds him; who commits an offense discreditable to the International Union or its subdivisions; who creates dissension among the members; who destroys the interest and harmony of the Local Union; who seeks to dissolve any Local Union or separate it from the general organization; who wilfully slanders or libels an officer or member of the Organization; who violates the trade rules of the locality in which he is working; who fraudulently receives, misapplies, converts or embezzles the funds of any subdivision of the International Union or the monies of any member entrusted to him; who violates his obligation or any section of the Constitution, Rules, Edicts and Ritual of the International Union; who divulges the password to anyone except the officer authorized to receive the same; who is guilty of insubordination; or who refuses to acknowledge or perform the lawful command of those authorized within the International Union to issue the same, may be disciplined or, upon trial therefor and conviction thereof, be fined, suspended or expelled from his Local Union.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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MEMORANDUM FOR RESPONDENTS IN OPPOSITION

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Attorneys for Respondents

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-741

ROBERT E. MESSENGER, *Petitioner*,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 4, and INTERNATIONAL UNION OF OPERATING ENGINEERS AND CHARLES DE ROSA, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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MEMORANDUM FOR RESPONDENTS IN OPPOSITION

ARGUMENT

The District Court's order granting summary judgment against petitioner was unanimously affirmed by the Court of Appeals, which declared his appeal to be "totally without merit." (Pet.[1] p. 2a). This

[1] "Pet." refers to the Petition for Certiorari. "Record" refers to the "Appendix to Brief of Petitioner-Appellant" in the Court of Appeals.

characterization is entirely justified and applies *a fortiori* to petitioner's effort to obtain a second round of appellate review. The holding below that petitioner had failed to demonstrate any infirmity in the union's internal proceeding is wholly consistent with *Boilermakers* v. *Hardeman*, 401 U.S. 123, and presents no question of general importance warranting this Court's consideration.

1. Petitioner alleges that his rights under § 101(a)(5)(A) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 523, 29 U.S.C. § 411(a)(5) (hereafter LMRDA) were denied because the charge against him did not specify the precise clause of the provision of the union constitution on which the charge was based.

The Court of Appeals properly rejected this contention:

> "The charge was made by a fellow member, by letter. It referred, by number, to a certain catchall provision in the constitution. Plaintiff complains that this provision listed 13 types of general offenses, and that the charge did not, in terms, state which one was relied on. This is true. However, the letter asserted the basic facts upon which the accusation depended. It is an erroneous legalism for plaintiff to say that he received no notice of the "charge brought against me". It was not necessary to specify into which particular clause in the section the conduct fitted. All that plaintiff was entitled to was adequate notice as to what, factually, he must defend against. *Boilermakers* v. *Hardeman*, 1971, 401 U.S. 233. This he received. Beyond this we have "no warrant to scrutinize the union regulations in order to determine whether particular conduct may be punished at all. Id. at 245." (Pet. p. 2a).

This reasoning correctly applies *Boilermakers*, which held that the right to notice guaranteed by § 101(a)(5) is one of fundamental fairness rather than of technical nicety. As Petitioner appears to acknowledge (Pet. p. 13), *Boilermakers* itself recognized that no constitutional provision need be cited at all in the charge.[2] Nevertheless he paradoxically insists that his rights were violated because, although the constitutional provision *was* cited, the charge was not made even more explicit. While Petitioner now asserts that "this is the kind of thing which would 'mislead or otherwise prejudice'" the union members' defense (Pet. p. 13), in his affidavit in opposition to the motion for summary judgment he did not even assert that he was misled. See p. 4, n. 3, *infra*. He simply chose to rest on what the Court of Appeals aptly described as the "erroneous legalism" that a charge was invalid if it failed to make explicit the particular clause of the union constitution. The rejection of that tactic raises no issue of sufficient significance to warrant this Court's consideration.

2. Petitioner charges that the courts below "*completely overlooked* the holding of [*Boilermakers*] with respect to the question of the sufficiency of the evi-

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[2] This is implicit both in the Court's holding that the charge need not be based on any constitutional provision at all (401 U.S. at 244) and the statement "[*w*]*here, as here*, the union's charges make reference to specific written provisions, § 101(a)(5)(A) obviously empowers the federal courts to examine those provisions and determine whether the union member had been misled or otherwise prejudiced in the presentation of his defense." *Id.* at 245 (emphasis supplied). Thus, while the charge need not specify any constitutional provision, if it does so the member would be entitled to relief under § 101(a)(5)(A) if he were misled or otherwise prejudiced by being convicted under a different provision.

dence." (Pet. pp. 13-14, emphasis in original). But the fault is in Petitioner, not in the courts below. Neither in his complaint nor in his affidavit pursuant to F.R.Civ.P. 56(e) opposing summary judgment did petitioner assert that he was entitled to relief on the ground that no evidence had been introduced against him in support of the charges. His only "due process" objection under §101(a)(5), was the failure of the charge to specify the exact clause of the constitutional provision relied upon.[3] The Court of Appeals was obviously correct in refusing to set aside the summary judgment on a ground which was not based on "specific facts" set forth in Petitioner's opposing affidavit. See *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 288-290.

3. Finally, Petitioner objects to the union's refusal to accept his tender of the fine by a check marked "Payment under Protest." The Court of Appeals

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[3] With respect to the trial, the affidavit in support of the motion for summary judgment asserted as follows:

> "The trial was held in accordance with said notice and the provisions of the International Constitution. The charging party testified, and the Plaintiff was offered an opportunity to testify, but he chose not to respond to the charges. The vote of the body was 161 'guilty', 22 'not guilty', and 5 blanks. A fine of $500.00 was imposed upon the Plaintiff. On June 26, 1967, notice thereof was sent to the Plaintiff, a copy of which is attached hereto and marked Exhibit E." (Record, p. 5a.)

In his opposing affidavit Petitioner responded as follows:

> "Answering paragraph 4 of said Walter J. Ryan's affidavit, I deny that 'I chose not to respond to the charges' at the trial. At the trial I attempted to ascertain what specific offense I was being charged with, and I received no reply other than the reference to the aforementioned section of the constitution." (Record, p. 28a.)

ruled that defendants "had a right to" refuse that tender (Pet. p. 1a). Petitioner cites no provision of the LMRDA or any other federal law to the contrary. Moreover, Petitioner conveniently overlooks the Court of Appeals' determination that:

> "* * * as a separate matter, this tender was long after the six months grace that, as plaintiff had been told, the union constitution afforded for unconditional receipt of fines, viz., without an application for reinstatement into the union." (Pet. p. 1a):

Petitioner now asserts that the purpose of the refusals was to harass him (Pet. pp. 9, 10-11), but he does not explain how this would raise a federal question. In any event, Petitioner's affidavit in opposition to the motion for summary judgment (Record pp. 27a-29a) asserted no "specific facts" in support of such a charge. On the contrary, it left uncontradicted the assertion in respondent's affidavit that because of Petitioner's tardiness "there was no alternative for Local 4 but to comply with the Constitution and expel him from membership." (Record p. 7a).[4]

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[4] Paragraph 7 of the affidavit filed in support of respondents' motion for summary judgment states:

> "The Plaintiff refused to comply with [the provisions of the Constitution dealing with payment of fines]; and after being more than six months in arrears, there was no alternative for Local 4 but to comply with the Constitution and expel him from membership." (Record, p. 7a.)

Petitioner's sole response to Par. 7 was "I do not deny that the provisions of the union's constitution are correct, as stated." (*Id.* p. 28a).

CONCLUSION

By reason of the foregoing, the Petition for Certiorari should be denied.

Respectfully submitted,

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